

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

TELECOM CONSULTING, INC.,

Plaintiff,

Case No. 2015-471-CB

vs.

TODD J. BAILEY d/b/a ATLAS
WEB CONSULTING, ATLAS WEB
CONSULTING, LLC, and BLUE
NOVA MARKETING, LLC,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10). Defendants have filed a response and request that the motion be denied.

In addition, Defendants have filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and (8). Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Defendants Atlas Web Consulting, LLC ("Defendant Atlas") and Blue Nova Marketing ("Defendant Blue") are internet marketing firms allegedly owned and operated by Defendant Todd Bailey ("Defendant Bailey"). On April 25, 2014, "Atlas Web Consulting, a Michigan corporation" ("Atlas Inc.") and Plaintiff entered into an "Independent Contractor Agreement" ("Agreement"). (See Exhibit 2 to Plaintiff's Motion.) Pursuant to the Agreement, Plaintiff agreed to act as a non-exclusive independent sales representative for Atlas Inc.

On February 13, 2015, Plaintiff filed his complaint in this matter ("Complaint"). The Complaint includes the following claims: Count I- Breach of Contract against Defendant Bailey and Defendant Atlas; Count II- Negligence against Defendant Bailey and Defendant Atlas; Count III- Violation of the Michigan Sales Representative Statute against Defendant Bailey and Defendant Atlas; Count IV- Tortious Interference with a Contract against Defendant Atlas; Count V- Tortious Interference with a Contract against Defendant Nova; Count VI- Tortious Interference with a Business Relationship/Expectancy against all Defendants; Count VI- Accounting of Defendant Bailey and Defendant Atlas; Count VII- Civil Conspiracy against Defendants Bailey, Atlas and Nova, and Count VIII- Unjust Enrichment against Defendant Nova.

On July 2, 2015, Plaintiff filed its instant motion for partial summary disposition pursuant to MCR 2.116(C)(10). On August 21, 2015, Defendants filed their response and request that the motion be denied.

On July 20, 2015, Defendants filed their instant motion for summary disposition pursuant to MCR 2.116(C)(4) and (8). On August 4, 2015, Plaintiff filed its response and requests that the motion be denied.

On August 31, 2015, the Court held a hearing in connection with both motions and took the matters under advisement.

II. Standard of Review

Summary disposition under MCR 2.116(C)(4) is appropriate when the trial court "lacks jurisdiction of the subject matter." MCR 2.116(C)(4). For jurisdictional questions under MCR 2.116(C)(4), this Court "determine[s] whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate ... [a

lack of] subject matter jurisdiction.' " *L & L Wine & Liquor Corp. v. Liquor Control Comm.*, 274 Mich App 354, 356, 733 NW2d 107 (2007).

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

A. Defendants' Motion for Summary Disposition

1. Lack of Subject Matter Jurisdiction

In their motion, Defendants first contend that Plaintiff's claims should be dismissed for lack of subject matter jurisdiction or transferred to the district court under MCR 2.227(A). Specifically, Defendants assert that the amount in controversy in this matter falls below the \$25,000.00 jurisdictional threshold for circuit courts as provided by MCL 600.605.

“Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.” MCL 600.605. “Thus, circuit courts are presumed to have subject-matter jurisdiction unless jurisdiction is expressly prohibited or given to another court by constitution or statute.” *In re Wayne Co. Treasurer Petition*, 265 Mich App 285, 291; 698 NW2d 879 (2005). Under MCL 600.8301(1), subject-matter jurisdiction is conferred with the district court when the amount in controversy is less than \$25,000. “[T]he plain, ordinary, and legal meaning of ‘amount in controversy’ under MCL 600.8301(1) is the amount the parties to a lawsuit dispute, argue about, or debate during the litigation.” *Moody v. Home Owners Ins. Co.*, 304 Mich App 415, 430; 849 NW2d 31 (2014).

The general rule in Michigan is that “jurisdiction of the court is determined by the amount demanded in the plaintiff’s pleadings, not by the sum actually recoverable or that found by the judge or jury at trial. *Zimmerman v Miller*, 206 Mich 599, 604-605; 173 NW 364 (1919). However, a party may not merely say some magic words and confer jurisdiction where it would otherwise not exist *Moody*, 304 Mich App at 433-434. Rather, “a court must make its own determination regarding the existence of a statutory basis for jurisdiction” and “must make this jurisdictional determination before the fact-finding of the trial has concluded.” *Id.* at 434.

In its response, Plaintiff contends that the amount in controversy in this matter is more than \$25,000.00, and that as a result jurisdiction with this Court is proper. In support of its position, Plaintiff relies on an allegations within its complaint that “the

amount in controversy exceeds \$25,000.00” (See Complaint, at ¶7.), its prayer for relief in connection with its Counts III and VIII in which it requests “an amount to exceed \$25,000, together with costs, prejudgment interest, and attorney fees.” (Id. at pp. 7, 12.) p. 12.), and an affidavit executed by Joseph Pytel, Plaintiff’s president, in which he testifies that as of July 8, 2015 Defendants owe Plaintiff \$80,750.00 plus penalty damages. (See Exhibit 2 to Plaintiff’s Response, at ¶5.) Based on Mr. Pytel’s testimony, the Court is convinced that this Court has jurisdiction over this matter at this time. While Plaintiff may ultimately only be entitled to recover damages, if any, under \$25,000.00, that fact is unclear at this time. The Court is convinced that the issue of what damages Plaintiff could ultimately recover remains in dispute, and that as a result Defendants’ motion for summary disposition pursuant to MCR 2.116(C)(4) must be denied without prejudice.

In their motion, Defendants also contend that Plaintiff has failed to state viable claims. The Court will address each of Plaintiff’s claims in turn.

2. Breach of Contract (Count I).

The elements of breach of contract are: “(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach.” *Miller–Davis Co v. Ahrens Constr, Inc. (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). In the Complaint, Plaintiff alleges that it and Defendant Bailey, doing business as Atlas Web Consulting, a Michigan Corporation entered into a contract on April 26, 2013. (See Complaint, at ¶ 6.) Further, Plaintiff alleges that Defendant Bailey and Defendant Atlas breached the terms of the Agreement (Id. at ¶¶15, 16, 19 & 20.), and that Plaintiff has suffered damages as

a result of the breach(es). (Id. at 17.) Accordingly, Plaintiff has stated a prima facie case for breach of contract. As a result, Defendant motion for summary disposition of Plaintiff's breach of contract claims pursuant to MCR 2.116(C)(8) must be denied.

3. Negligence (Count II).

The traditional elements of a negligence claim are duty, breach of duty, causation, and damages. *Pressey Enterprises, Inc. v. Barnett-France Ins. Agency*, 271 Mich App 685, 687; 724 NW2d 503 (2006). In its complaint, Plaintiff alleges that Defendants Bailey and Atlas owed it a duty to perform its obligations under the Agreement in a non-negligent manner, that they breached their duties, and that it has suffered damages as a result of the breaches. (See Complaint, at ¶¶ 34-36.) "Accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 465; 683 NW2d 587 (2004). While Defendants contest whether Defendants Bailey and/or Atlas breached that duty, the Court is convinced that Plaintiff has sufficiently pled its negligence claim. Consequently, Defendants' request for summary disposition of Plaintiff's negligence claim pursuant to MCR 2.116(C)(8) must be denied.

4. Michigan Sales Representative Statute (Count III)

In their motion, Defendants contend that Plaintiff has failed to state a viable claim under the Michigan Sales Representative Commission Act ("SRCA") because they are not engaged in the business of providing goods. However, the issue of whether the parties' activities fall within the purview of the SRCA is an issue of fact. In reviewing a ©(8) motion, the Court does not act as a factfinder, but accepts as true all well-

pleaded facts. *Abel v. Eli Lilly & Co*, 418 Mich 311, 324; 343 NW2d 164 (1984). Accordingly, Defendants request for summary disposition based on its position that it does not sell products required analysis which falls outside of the scope of this Court's review under the ©(8) standard. Consequently, Defendants' motion for summary disposition of Plaintiff's SRCA claim must be denied.

5. Tortious Interference (Count IV and V)

Plaintiff's complaint includes claims for, *inter alia*, (1) tortious interference with a business relationship or expectancy and (2) tortious interference with a contract. Tortious interference with a contract and tortious interference with a business relationship or expectancy are separate and distinct torts under Michigan law. *Health Call of Detroit v Atrium Home & Health Care Services, Inc.*, 268 Mich App 83, 89; 706 NW2d 843 (2005). The Court in *Health Call* summarized the elements needed to establish the torts as follows:

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.

Id., at 89-90 [internal citations omitted]

Defendants first contend that Plaintiff has failed to establish that it had a valid business relationship with Defendant Bailey. However, Plaintiff has alleged that it had a contract with Defendant Bailey. (See Complaint, at ¶ 9.) Consequently, Plaintiff has sufficiently alleged that it had a business relationship with Defendant Bailey. While

Defendants may contest whether Defendant Bailey was in fact a party to the Agreement, such an inquiry is an issue of fact that goes beyond the (C)(8) standard of review. As a result, Defendants' position is without merit.

Defendants also assert that Plaintiff has failed to provide an evidence that any of them interfered with the Agreement or that they engaged in any malicious, illegal or wrongful act. However, once again this position requires review beyond that required under MCR 2.116(C)(8). Consequently, Defendants' positions must be denied as improper.

6.. Accounting (Count VI)

In their motion, Defendants contend that an accounting is not needed in this matter because Plaintiff seeks a specific sum due under the Agreement and where Plaintiffs have an adequate remedy without such an action. While Defendants may be ultimately correct in that an accounting is unnecessary, the Court is convinced that such an argument is premature in light of the early stage of this case. Consequently, Defendants' position is denied.

7. Civil Conspiracy (Count VII)

In their motion, Defendants contend that Defendant Atlas, Defendant Bailey and Defendant Blue cannot conspire with one another because a corporation cannot conspire with its own agents and employees when such agents and employees are acting within the scope of their employment. The intra-corporate conspiracy doctrine provides that a corporation cannot conspire with its own agents or employees. *Hull v. Cuyahoga Valley Joint Vocational Sch Dist Bd of Educ*, 926 F2d 505, 510 (CA 6, 1991). In this case, it has yet to be determined what role Defendant Bailey played with

respect to Defendant Atlas and Defendant Blue. While the facts may ultimately require the dismissal of Plaintiff's conspiracy claim, the Court is satisfied that such a determination goes beyond the (C)(8) standard and must be denied.

8. Unjust Enrichment (Count VIII)

"The elements of a claim for unjust enrichment are (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to plaintiff from defendant's retention of the benefit." *Bellevue Ventures, Inc. v. Morang-Kelly Investment, Inc.*, 302 Mich App 59, 64; 836 NW2d 898 (2013). In the Complaint, Plaintiff alleges that Defendant Blue has been unjustly enriched by obtaining commissions that Plaintiff is entitled to, and that it is unjust for its retain those commissions. (See Complaint, at ¶¶ 82-85.) The Court is convinced that such allegations sufficiently plead a claim for unjust enrichment against Defendant Blue. As a result, Defendants' motion for summary disposition of Plaintiff's unjust enrichment claim must be denied.

B. Plaintiff's Motion for Partial Summary Disposition

In its motion, Plaintiff seeks summary disposition of its breach of contract and SRCA claims pursuant to MCR 2.116(C)(10) based on Defendants alleged failure to timely respond to its first requests for admission. In response, Defendants assert that they sent responses to the requests in question. (See Defendants' Exhibit 1.) Based on Defendants' exhibit, the Court is convinced that Defendants have provided responses to Plaintiff's requests, and that Plaintiff's request for summary disposition based on Defendants' failure to respond to the requests for admission must be denied.

IV. Conclusion

Based on the foregoing, Defendants' motion for summary disposition pursuant to MCR 2.116(C)(4) is DENIED. Further, Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) is DENIED. Finally, Plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) is DENIED. The Court states this Opinion and Order neither resolves all pending matters nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: NOV 20 2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge